New Mexico Energy, Minerals and Natural Resources Department

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Jim Berlow, Director
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Office of Resource Conservation and Recovery
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (5303 P)
Washington, D.C. 20004

Via email: berlow.james@epa.gov

Re: Preemption of State Financial Assurance Requirements by CERCLA Bonding Rules

Dear Mr. Berlow:

I am General Counsel for the New Mexico Energy, Minerals and Natural Resources Department ("EMNRD").

It is our understanding that EPA has requested state input on regulations proposed to be adopted by EPA pursuant to 42 U.S.C. § 9608(b), which requires the President to promulgate regulations governing the establishment and maintenance of evidence of financial responsibility for classes of facilities that produce, transport, treat, store, or dispose of hazardous substances. It is further our understanding that EPA has determined that hard rock mines are one such class.

Specifically, EPA has requested state comment on whether EPA's regulations will have an effect on state financial assurance programs, given 42 U.S.C. 9614(d), which provides that "...no owner or operator of a ... facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter shall be required under any State law ... to establish and maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance...." Plainly, the concern is whether Section 9614(d), in conjunction with EPA's regulations, will have a preemptive effect on independent, state financial assurance requirements in connection with hard rock mining.

As you know, the exact language of the EPA regulations has not yet been developed, or at least published to the states. Our comments, then, will necessarily be broad in nature and may require amendments or additions, depending on the actual language of the regulations, when proposed.

There are two departments in New Mexico government that could be affected by Section 9614(d) and the regulations promulgated by EPA. One is EMNRD, and the other is the New Mexico Environment Department ("NMED"), which imposes financial assurance requirements in

connection with discharge permits that are required when mining operations may impact groundwater or surface water. In such situations EMNRD and NMED use a joint bonding vehicle, allowing either or both Departments to collect. While we understand that NMED intends to separately respond to EPA's request for comment, and while I am writing on behalf of EMNRD, I nonetheless will address what I believe could be impacts on NMED.

As an initial matter, EMNRD questions the determination that hard rock mining should be included in the class of activities that will fall under the regulations envisioned by EPA. Our understanding is that the data from which it was determined that hard rock mining is a high-risk activity was generated from mines that were active over thirty years ago, and abandoned before states began regulating hard rock mining. Since then, states like New Mexico have set in place comprehensive and well designed regulatory systems to ensure that hard rock mines are designed, operated and reclaimed in such a way that environmental impact is minimized. We expect that if EPA were to use data from mines that have been operated and reclaimed in accordance with state regulations, EPA would be far less likely to classify hard rock mining as a high risk activity.

New Mexico's Regulatory Program and Financial Assurance

The preemption issue is critical to the State of New Mexico's mining regulation program, as I expect that it is for most states. Financial assurance is an integral, indeed, inseparable part of New Mexico's regulation of hard rock mining and attendant reclamation requirements. The New Mexico Mining Act, NMSA 1978, §§ 69-36-1 to 20 ("Act"), was adopted in 1993. Its purpose is to "promot[e] responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals...." Act § 69-36-1. Reclamation is defined as "the employment during and after a mining operation of measures designed to mitigate the disturbance of affected areas and permit areas and to the extent practicable, provide for the stabilization of a permit area following closure that will minimize future impact to the environment from the mining operation and protect air and water resources." Act 69-36-3(K). The Act mandates State regulation of all mines that produced marketable minerals for a total of at least two years between January 1, 1970 and the effective date of the Act, as well as all development and extractive activity undertaken after the effective date of the Act.

EMNRD's mining regulatory scheme, set forth in Title 19, Chapter 10 NMAC, is a comprehensive system that requires operators to obtain permits for all exploration and mining, including projects that are expected to have minimal impact on the environment. Permitting requires scrutiny of a proposed project by not only EMNRD geologists and hydrologists, but by other state agencies that have expertise in wildlife, habitat, cultural resources, and hydrology, including the New Mexico Office of the State Engineer and NMED. For non-minimal impact projects, public input and hearings also are required. As part of this process, the permitee is required to develop a closeout plan that sets forth in detail all reclamation procedures that are necessary to return the area, as much as possible, to its original condition and/or reestablish a self-sustaining ecosystem.

For NMED's part, it requires that an applicant for a discharge permit submit for NMED scrutiny and approval a discharge plan containing operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water. NMED also mandates public participation and hearing. The purpose of the discharge permit and discharge plan requirement is to protect all ground water of

the state of New Mexico which has an existing concentration of 10,000 mg/l or less TDS, for present and potential future use as domestic and agricultural water supply. 20.6.2.3101(A) NMAC. NMED sets forth specific water quality standards for human health, domestic water supply and irrigation. 20.6.2.3103 NMAC. In order to obtain a discharge permit, NMED requires, among other things, a closure plan to prevent the exceedance of the standards set forth in Section 20.6.2.3103 NMAC and the presence of a toxic pollutant in ground water after the cessation of operation. The closure plan must include a description of closure measures, maintenance and monitoring plans, post-closure maintenance and monitoring plans, financial assurance, and other measures necessary to prevent and/or abate such contamination. 20.6.2.3107(A)(11).

Like NMED, EMNRD requires financial assurance before it will issue an exploration or mining permit. The Act requires financial assurance for performance of the closeout plans both for mining undertaken prior to the Act's effective date, § 69-36-7(G), and for operations to be undertaken after the Act's effective date.

> [T]the applicant [shall] file with the director, prior to the issuance of a permit, financial assurance. The amount of the financial assurance shall be sufficient to assure the completion of the performance requirements of the permit, including closure and reclamation, if the work had to be performed by the director or a third party contractor and shall include periodic review to account for any inflationary increases and anticipated changes in reclamation or closure costs.

§ 69-36-7(Q). The amount of financial assurance is determined by the Director of EMNRD's Mining and Minerals Division ("MMD"). 19.10.12.1205(A) NMAC.

If reclamation is not undertaken or completed or the permitee defaults on any conditions in the permit, the Director of MMD is required to collect the funds and use them to complete reclamation. 19.10.12.1211 NMAC.

The Act further provides that State financial requirements shall not duplicate federal financial requirements. Id.

The Preemption Issue

We do not believe that 42 U.S.C. 9614(d) preempts New Mexico's hard rock mining financial assurance requirements. Preemption, as you know, is disfavored. "Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317, (1981), quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981); Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977); Perez v. Campbell, 402 U.S. 637, 649 (1971).

Moreover, preemption is ultimately a matter of Congressional intent. English v. General Electric Co., 480 U.S. 72, 78-79 (1990). The provision at 42 U.S.C. 9614(a) that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State," indicates that any conclusion regarding state preemption should be reached with caution.

Combining Congress' decrial of preemption in Section 9614(a) with the general disfavor of preemption, we believe that whatever preemptive effect 42 U.S.C. 9614(d) may be given, it should be quite narrow.

Generally, a state law may be preempted **(i)** if Congress explicitly declares it, **(ii)** if Congress' intent to preempt may be inferred by sufficiently pervasive federal regulation, **(iii)** if federal interest is sufficiently dominant that it should be assumed that enforcement of state law is precluded or **(iv)** where compliance with both federal and state law is physically impossible or where state law is an obstacle to the accomplishment of the full purposes of Congress. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141-, 153 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See also Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n 461 U.S. 190, 201 (1983).

With respect to what may be termed conflict preemption, (iv) above, there appears to be no reason that compliance with both federal and state bonding requirements should be characterized as a physical impossibility or that compliance with the latter would be an obstacle to the purposes of the former. Moreover, it would appear that the dominance of federal interest, (iii) above, would not have a preemptive effect on state bonding of mining projects. The legitimacy of a state's interest in regulating the environmental effects of mining is well recognized and has been affirmed by the Supreme Court. See, e.g., California Coastal Commission v. Granite Rock Company, 480 U.S. 572, 582 (1987).

The issue, then, is whether 42 U.S.C. 9614(d) is an explicit declaration of Congressional intent to preempt the type of bonding engaged in by EMNRD and/or NMED, (i) above, or whether the regulations adopted by EPA pursuant to 42 U.S.C. § 9608(b) are sufficiently pervasive so as to have such a preemptive effect, (ii) above.

We believe that 42 U.S.C. 9614(d) is not, and should not be construed as, a declaration of Congressional intent to preempt state bonding, as undertaken in New Mexico or other similar state programs. The purpose of New Mexico's financial assurance requirements for hard rock mining is to ensure performance of the planned reclamation required by New Mexico statute and regulation and by EMNRD and NMED permits and closeout plans. The bond amounts are based on estimates of actual costs of the planned reclamation project, to ensure completion of planned mitigation of known and controlled disturbance. The bonding contemplated by CERCLA, on the other hand, does not secure performance of a plan but appears to be intended to cover liability for unplanned releases that might result from operation of the covered facilities.

In this regard, it is important to note that the New Mexico financial assurance may be called for a host of environmental reasons, both surface and subsurface, that do not entail the release of a hazardous substance. This illustrates the difference between the purposes of the New Mexico and federal financial assurance requirements and, so, a lack of Congressional intent for the latter to preempt the former. State financial assurance requirements like those of New Mexico's ensure compliance with reclamation/closure plans and safeguard against a variety of environmental ills that do not include hazardous releases. We do not believe that it can be successfully argued that Congress intended to supplant such far-reaching state requirements when it established financial responsibility requirements with the much narrower purpose of covering certain releases of hazardous substances.

The difference between the purposes of New Mexico and EPA bonding is significant for at least two reasons. First, New Mexico financial assurance is an integral part of the entire State permitting and enforcement process for hard rock mines. The amount of the bond and the determination of the events that require its collection are based on the regulator's intimate involvement in the development of the details of the mine and reclamation plans and understanding of how and why those details were developed. The establishment, call and use of the State bonds are intertwined with the permitting process and development of the closeout plans. The establishment of the CERCLA bond, on the other hand, is based on risk analysis taking into account past payment of the fund, commercial insurers, and past court settlements and judgments. It is not tailored to ensure performance of a planned reclamation and closure that is an outgrowth of a particular mine plan. If the risk-based CERCLA bond were truly intended to supplant performance-based New Mexico bonds, it would not only necessitate an expansion of the number and type of EPA staff to participate in the permitting process, it would involve a federal intrusion into the details of state hard rock permitting procedures and decisions that likely would not survive judicial scrutiny.

Second, financial assurance is the ultimate basis of the State's ability to enforce its reclamation requirements, as set forth in the closeout plans. An event that would otherwise trigger the State calling its bond, but which does not involve a release of a hazardous substance, would leave the State with no effective remedy to ensure reclamation. In other words, if EPA regulations are given preemptive effect, New Mexico and similarly situated states would be exposed to defaults under their permits, statutes and regulations for which they would have no effective remedy because those defaults may not be related to a release of hazardous substance. A failure to properly implement erosion control, to adequately backfill pits, to plug and abandon exploration holes, to revegetate, or to reclaim at all are just a few examples of defaults that could trigger New Mexico's ability to call its bond, but that would not trigger a call on the EPA bond. The point, here, is that not only are the purposes of the New Mexico and CERCLA financial assurance requirements sufficiently different that 42 U.S.C. 9614(d) should not be misconstrued as an explicit declaration by Congress to preempt, but to so construe Section 9614(d) would have a genuinely crippling effect New Mexico's right to regulate hard rock mining that takes place within its borders.

Finally, with respect to preemption that is inferred by pervasive federal regulation, (ii) above, that currently is in the hands of EPA and the way in which its regulations are to be drafted. We would hope that EPA would carefully craft its regulations so that they are not interpreted as extending beyond the intent of Congress in this matter and having a preemptive effect on financial assurance requirements like those found in New Mexico. We feel confident that EPA does not intend for its regulations to have a preclusive effect that is broader than that fairly implied by its implementing statute.

Avoiding Litigation and Confusion Regarding the Preemption Issue

It is important for me to point out the significance of EPA's role in the ultimate determination of whether CERCLA bonding requirements impact those of New Mexico and other states. Certainly, EPA's view of the matter is given weight by the courts. The Supreme Court has stated on more than one occasion that regulations adopted by federal agencies, while not dispositive, are indications of whether state law is intended to be preempted.

> As we explained in Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 718, 105 S.Ct. 2371, 2377, 85 L.Ed.2d 714 (1985), it is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity: "[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, ... we can expect that they will make their intentions clear if they intend for their regulations to be exclusive."

California Coastal, 480 U.S. at 583.

Doubtless, the language of 42 U.S.C. 9614(d) may prompt some in the mining industry to argue that the CERCLA financial responsibility regulations preempt the financial assurance requirements of New Mexico and states with similar regulations, leading to protracted and costly litigation that most states can ill afford. Much, if not all, of such litigation could be avoided if EPA would make clear its recognition that Congress did not intend for Section 9614(d) to preempt state regulations similar to those of New Mexico's. This recognition could be contained either in the EPA regulations, themselves, or in the preamble to the regulations.

I ask EPA to consider these matters and to make clear when propounding its regulations that it is not Congress' and, so, not EPA's, intent to preclude states from securing performance of the reclamation requirements of their statutes, permits, regulations and plans developed pursuant to them.

Very truly yours,

William Brancard

William Brancard
General Counsel

cc: Ben Lesser, EPA
Greg Conrad, IMCC